

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

74-1860
75-1253 *B
PAS*

To be argued by
ELKAN ABRAMOWITZ

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 74-1860, 75-1253

UNITED STATES OF AMERICA,

Appellee;

—v.—

GEORGE STOFKY, CHARLES HOFF, AL GOLD
and CLIFFORD LAGEOLES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL AND ADDITIONAL BRIEF ON BEHALF
OF APPELLANTS GEORGE STOFKY and AL GOLD

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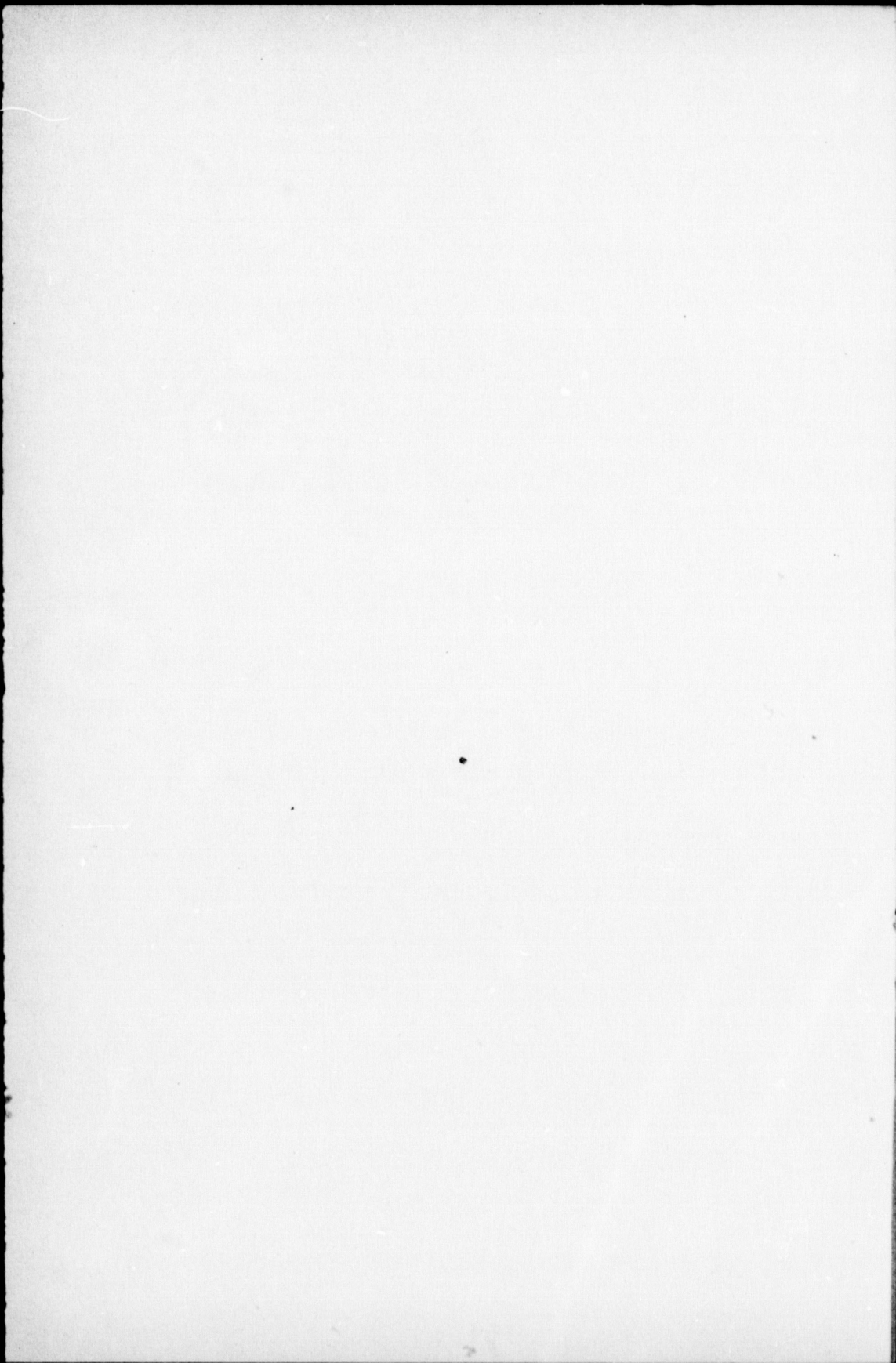


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Title 18, United States Code:

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Title 28, United States Code:

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Federal Rules of Criminal Procedure:

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Defendants-Appellants.

**SUPPLEMENTAL AND ADDITIONAL BRIEF ON BEHALF
OF APPELLANTS GEORGE STOFISKY and AL GOLD**

Preliminary Statement

On June 10, 1974, defendants Stofsky and Gold filed a notice of appeal from the judgments of conviction and from the order denying a motion for a new trial entered in the United States District Court for the Southern District of New York on May 31, 1974. On August 1, 1974, defendants Stofsky and Gold filed their brief and Joint Appendix in this Court with the designated docket number of 74-1860.* On September 12, 1974, prior to service of the government's brief, counsel for defendants received a letter from the prosecutor in this case stating that the United States Attorney's Office had obtained additional

* Co-defendants Charles Hoff and Clifford Lageoles filed a separate brief in this Court with the designated docket number of 74-1869.

information relevant to defendants' original motion for a new trial (SA. 22).^{*} On September 26, 1974, pursuant to a stipulation among the parties, this Court, per Honorable Walter M. Mansfield, ordered all proceedings in *United States v. Stofsky, et al.*, 74-1860 (hereinafter, for convenience, referred to as the Main Appeal) stayed pending the hearing and determination of a renewed motion for a new trial in the United States District Court for the Southern District of New York (SA. 25-8).

Pursuant to stipulated schedule, defendants renewed their motion for a new trial by notice of motion and supporting affidavit filed on October 4, 1974. During the pendency of this motion, by notice of motion filed on January 24, 1975, the defendants moved for an order dismissing the indictments in this prosecution on the ground that the term of the grand jury which returned the indictments had expired before the indictments were voted premised on this Court's opinions in *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974) and *Wax v. Motley*, 510 F.2d 318 (2d Cir. 1975).

On March 24, 1975, defendants filed another motion to dismiss the indictments herein on the ground that the prosecutor who presented the case to the grand jury was not properly authorized to appear before the grand jury.

On June 4, 1975, Honorable Lawrence W. Pierce, United States District Judge, denied all three motions without neither a hearing nor oral argument (SA. 82, 128, 148). Under the terms of the stipulation filed in the main appeal, this appeal is to be processed on an accelerated basis and consolidated with the main appeal.

^{*} References preceded by the letters "SA" refer to the Supplemental and Additional Appendix to this appeal; "A", to the Appendix to the Main Appeal; "MB", to the brief submitted by defendants Stofsky and Gold on the main appeal.

Statement of Facts

A. Introduction

In our brief submitted on the main appeal, we set forth the chronology and the significance of the discovery of documentary evidence establishing the perjury of Jack Glasser—rebutting with evidence of frequent cash deposits the government's claims: (1) that Glasser had inherited his wealth years before the events of this trial; and (2) that his substantial "savings" did not represent the *total* amount of moneys he obtained from fur manufacturers (MB. 25-29, 36-41).

What was not known by defense counsel at the time of the preparation of the main brief, however, was the fact that during the pendency of the first new trial motion before the district court—and for almost three and one-half months after the decision thereon—the government possessed documentary evidence showing that the defense discovery of \$57,000 in cash deposits from 1967 to 1970 represented only approximately 35% of the now conceded figure of \$157,000 in cash or probable cash deposits from 1962 to 1973. More significantly, almost all of the new total of cash deposits were made *after* 1962. The new evidence not only further establishes the falsity of Glasser's trial testimony, but, as will become clear below, clearly shows Glasser to have lied in his unsworn "explanations" relied upon by the court below in denying both motions for a new trial.

B. The Discovery of the New Evidence

Defendants served and filed their original motion for a new trial on April 22, 1974. On May 9 and 10, 1974, the government issued subpoenas to several banks seeking financial records relating to Mr. Glasser. The government received relevant bank records from The Greenwich

Savings Bank pursuant to letter dated May 14, 1974; from The Emigrant Savings Bank on May 22, 1974; from The Chemical and East New York Savings Banks on May 21, 1974; and from The Dollar Savings Bank on May 22, 1974 (SA. 49).

On May 23, 1974, the government submitted its affidavit in opposition to the defendants' motion making no reference to the fact that it had received bank documents in addition to those submitted by the defense in support of its motion. The Assistant United States Attorney in charge of the prosecution sought to explain this omission by stating that the records the government had received prior to May 23, 1974 were incomplete, but he chose not to seek an adjournment of the motion or to inform the court and defense counsel of the existence of the bank documents. The prosecutor stated that he

"was aware that new trial motions were pending . . . with sentencing of the defendants scheduled for May 31, 1974 . . ." (SA. 50).

Ignoring the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and applying his own standard, the prosecutor concluded that in his

"judgment . . . the bank records which had been produced in response to the grand jury subpoenas did not establish that any statement in the government's papers which had been submitted in response to the . . . motions was erroneous" (SA. 50).

Based on this judgment, the prosecutor, after consultation with his superiors, deliberately chose not to reveal the bank documents during the pendency of the new trial motion and for months thereafter. Of course, the government later conceded that a major "factual" assertion contained in the original papers and relied upon by the district court—Glasser's continued reliance on his wife's

"inheritance", that time used to explain \$40,000 to \$50,000 of the cash in savings bank in 1972 (A. 745a-746a)—was patently false. This revised estimate was later characterized—somewhat euphemistically—by the government as "high and incorrect"; the government further conceded that Glasser now cannot estimate at all how much, if any, of the "inheritance" was included in the savings accounts in 1972 (SA. 22-23). Indeed, since the new bank documents revealed for the first time that very nearly all of the \$157,000 of cash and unexplained deposits of Glasser were made after 1962—and not before*—it is clear that none of it could be attributed to any inheritance and the prosecutor's judgment concerning the consistency of these records with the papers submitted in opposition to the original motion was woefully wide of the mark.

The documents were made available to defense counsel on September 12, 1975, and defendants thereafter renewed their motion for new trial.

C. The District Court Opinion

Other than the obvious significance of the size of the cash deposits in relation to the defense contention that Glasser retained all moneys received from manufacturers and passed none of it on, the fact remains that the government's belated disclosure indicates that Glasser's unsworn "explanations" of the original \$57,000 contained in part in an *ex parte* affidavit and relied upon by the lower court to deny the first motion for a new trial

* The Emigrant account was opened in January 1962 with a deposit of \$250. The Greenwich account was opened in February 1962 with a deposit of \$500. The East New York Savings Bank was opened in October 1967 with a deposit of \$751.05. The Dollar Savings Bank was opened some time prior to January 1, 1960 (the exact date is not determinable) and on that date had a balance of only \$2,459.68.

(erroneously, we claim, see MB 36-50), were just as false as the testimony he gave at the trial. Yet, the lower court, without even a hearing at which Glasser could be sworn and cross-examined, continued to credit Glasser's amended explanations of his wealth to deny defendants' renewed motion for a new trial after nine months of deliberating the papers submitted by both sides (SA. 82).

In doing so, the lower court found that the government's failure to disclose the additional bank records "while the first new trial motion was *sub judice* . . . was highly inappropriate . . . [and] constituted an error in judgment" (SA. 84). Despite this finding, however, the court refused to apply the test applicable to all cases of governmental suppression of evidence, and analyzed the new documents to be ". . . more of the same" (SA. 86). Although it is true, as the court somewhat naively indicated (SA. 87), that the defense *theory* was presented at the trial, it is also true that the jury was unaware: (1) of the existence of any documentation of individual cash deposits of similar size to the alleged payoffs; (2) of documentation of Glasser's outright perjury and of his subsequent begrudging, shifting and wholly-undocumented "explanations" of his wealth; and (3) of the government's concession that Glasser and his wife had lied at the trial and that a significant argument in its summation at the trial concerning the validity of the "inheritance" was false. Perhaps most significantly, however, the court once again—as it did on the first motion for a new trial—substituted itself for the jury and accepted as "more reasonable and more damaging [to defendants] . . ." (SA. 87) an unsworn explanation concerning some \$21,000 of the \$157,000— ". . . that the extent of the scheme involving the defendants was far more widespread than previously known" (SA. 87; A. 750a). No mention was made by the court of the possibility that these post-trial "explanations" might—just might—be contrived, and that the de-

fense *theory* that Glasser retained all monies he obtained—now buttressed by significant documentation and inconsistent statements going right to the heart of the defense—could have been accepted by a jury as *fact* at the trial.

ARGUMENT

POINT I

Defendants' second new trial motion, based upon additional evidence of perjury—belatedly revealed by the Government—should have been granted.

A. Introduction

In the main brief, we urged (MB. 47-50) that under any standard governing newly-discovered evidence of perjury, a new trial is mandated under the circumstances of this case. We urged there, and continue to urge, that even if the test which we claim the court below erroneously employed—that contained in *United States v. De Sapio*, 435 F.2d 272, 286 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), requiring a finding that the new evidence would probably produce a different verdict on retrial—were applicable, the defendants here are entitled to a new trial. While it may be true, as the court below found, that the new evidence does not “lead inevitably to the conclusion that Glasser lied about the payoffs to the defendants . . .” (A. 803a)—a standard of proof not required under any test—it does establish, as the court found in both opinions, that Glasser “engaged in an effort to conceal information” and gave “false, or deliberately misleading testimony . . .” at the trial (SA. 86; A. 798a)—a fact which, in addition to the significance of the deposit slips themselves, was not established before the jury. In terms of “probabilities”—if that be the test—it would seem that a jury weighing Glasser's uncorro-

borated claims of payoffs to the defendants against the documented and conceded fact of his perjury, as well as the cash deposits themselves, in all likelihood would have rejected his testimony, which was central to the government's case against all defendants at the trial.*

We further urged in the main brief (MB 43-47), alternatively, that because of the apparently inadvertent failure of the government to disclose the exculpatory evidence contained in Glasser's tax returns prior to trial, the court should have applied a less severe test, the one contained in *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969) requiring only a finding that the evidence could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. Significantly, the lower court suggested in its denial of the first new trial motion that had it applied this test, it would have granted the motion (A. 808a). Additionally, the defendants indicated in the main brief that the violation of the principles of *Brady v. Maryland*, *supra*, concerning the tax returns, to the extent that the government's conduct could be considered a deliberate suppression of evidence, requires the application of the most liberal test—the one set forth in *United States v. Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), requiring a new trial if the evidence is merely material or favorable to the defense.

We here urge that in addition to the suppression of the tax returns, the deliberate and conscious suppression of the bank deposits during the pendency of the first new trial motion requires the application of the *Kahn* test or, at minimum, the *Miller* test. Under either, a new trial should be granted.

* *A fortiori*, should the more liberal test of *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928)—requiring a finding that the new evidence "might" produce a different verdict—be applied, the defendants likewise, under the facts of this case, should certainly be granted a new trial.

B. The Government's suppression of evidence requires the application of more liberal standards regarding newly-discovered evidence.

Despite the recent decisions of this Court in *United States v. Rosner*, —F.2d— (Dkt. No. 74-2290, 2d Cir. April 29, 1975) and *United States v. Seijo*, 514 F.2d 1357 (2d Cir. 1975), the lower court refused to apply the tests reaffirmed in these cases on the ground that the suppression here involved was post-trial rather than pre-trial (SA. 84-85). Consequently, the court erroneously tested the recently-revealed documents under the same standard it used to deny the original new trial motion without regard to the standards mandated in cases of governmental suppression.

In *United States v. Rosner*, *supra*, the defendant was charged with bribery, obstruction of justice and conspiracy. The principal witness for the government was a corrupt undercover policeman who had testified of five separate illegal payments, three of which were corroborated by tape-recordings. The defendant admitted those payments corroborated by tape, claiming entrapment, but was nevertheless convicted on these counts, and acquitted of the remaining two. At trial, the corrupt policeman, Leuci, admitted four instances of prior misconduct but denied others. Subsequent to the trial, Leuci admitted this testimony was false and stated that he was involved in many other acts of criminal misconduct.

In addition to Leuci's admitted perjury on these collateral matters, defendant sought a new trial based upon governmental suppression of three specific items of evidence—evidence only tending to prove what Leuci had subsequently admitted—that Leuci had lied at trial about the extent of his prior corrupt dealings: the so-called "Leuci-Lawrence * Tape", the so-called "Goe Memo-

* Lawrence was an informant who worked with Leuci.

randum" and interviews of Lawrence with the United States Attorney containing allegations of further corruption. The lower court found that the tape and the memorandum were improperly suppressed before the trial and assumed the same for the interviews and the memorandum of which the prosecutor became aware subsequent to the trial. This Court affirmed the lower court's finding that the applicable standard by which to test the newly-discovered evidence was the one relating to governmental suppression—there inadvertent—contained in *United States v. Miller, supra*, (could the evidence "have induced a reasonable doubt in the minds of enough jurors to avoid a conviction"). Finding that both Leuci's admitted perjury and *all* of the suppressed evidence would not have affected the jurors in such a way as to avoid a conviction—because: (1) the evidence related only to credibility in a collateral area where impeachment material on the same subject was already before the jury; and (2) the taped corroboration and the defendant's admissions, both strongly indicating guilt, were unaffected by the new evidence—the denial of a new trial was affirmed.

The court further properly rejected defendant's separate claim that he was *automatically* entitled to a new trial because of the post-trial suppression, finding no prejudice because the evidence had already been tested by standards governing prosecutorial suppression and was still insufficient to warrant a new trial.

Aside from factual distinctions between *Rosner* and the case at bar—the fact that Glasser's word with respect to the payoffs was uncorroborated and that the newly-discovered evidence relates not simply to impeachment on a collateral matter but to the defendants' guilt or innocence, nothing in *Rosner* stands for the proposition adopted by the court below that post-trial suppression

is to be ignored and excused, while pre-trial suppression activates different legal standards in determining the significance of the newly-discovered evidence. To state the proposition is to expose its absurdity: under the court's holding, there is nothing to compel the government to reveal new evidence when it is discovered, nor any sanction for its failure to do so. Such a rule would nullify the government's continuing obligation to reveal new evidence to defendants, no matter when it is discovered, and would permit the prosecution to suppress evidence without penalty. Taken to its logical conclusion, the government, with impunity, could wait until appeals are rejected and exhausted, a defendant incarcerated, or released from prison, before it disclosed earlier-discovered exculpatory evidence. Such a proposition is patently without merit.

If here, as in *Rosner*, the defendants' original motion for a new trial had been tested under standards relating to governmental suppression, and additional suppressed evidence were revealed subsequently and tested under the appropriate standard, then it might fairly be said—as was the holding in *Rosner*—that the defendants would not have been prejudiced by the subsequent suppression. But that was not the case here. Here, unlike *Rosner*, the suppressed evidence was only tested—as it was on the original motion—by the general standards relating to newly-discovered evidence without regard to prosecutorial suppression. The defendants were, therefore, severely prejudiced by the court's failure to apply the proper standard, especially in view of its statement that the evidence "might have swayed at least one juror in the past trial, and thus resulted in a mistrial" (A. 808a). Since such a finding would seem to require a new trial under the *Miller* standard, it is difficult to perceive how the lower court found that the defendants were not prejudiced by the governmental suppression.

The lower court's unwarranted distinction between post-trial and pre-trial governmental suppression also prevented its application of the standards of *United States v. Seijo, supra*, to the case at bar; the court so stated (SA. 88). It is submitted that the principles of *Seijo* are clearly applicable here.

In *Seijo*, the government's principal witness, Torres, a co-conspirator in a narcotics transaction, testified without substantive corroboration of the complicity of defendants. Torres had testified he had no prior narcotics conviction although his FBI criminal identification sheet, in the government's possession prior to trial, but misfiled and not discovered until after the trial, indicated the contrary. Applying the *Miller* standard applicable because of the government's inadvertent suppression of evidence, the court concluded that the newly-discovered evidence of perjury, even though it related only to credibility and was cumulative of other impeaching evidence, was sufficient to warrant a new trial, in part, because of the lack of corroboration of Torres and the emphasis in the prosecutor's summation of Torres' "truthfulness". (*Seijo, supra*, at 1365).

In so holding, this Court stated:

"Had the source and subject of Torres' untruthfulness on direct examination been disclosed and developed at the trial, the appellants' fate may well have been differently decided. Although the true answer to the precise question must remain unknown, enough is established in the record presented to demonstrate that the material withheld sufficiently touches upon the constitutionally protected rights of appellants and impairs the validity of the verdicts returned against them." (*Id.* at 1364-65)

Here, Glasser's testimony concerning the guilt of the defendants, like *Torres*, was uncorroborated; here, the prosecutor, as in *Seijo*, emphasized the witness' "truthfulness" in his summation; here, like *Seijo*, but unlike *Rosner*, Glasser's "... false and conscious concealment ... renders the uncorroborated substance of his testimony suspect" (*Seijo, supra* at 1364). Moreover, here, unlike the purely collateral nature of the perjury in both *Seijo* and *Rosner*, Glasser's perjury related directly to the guilt or innocence of the defendants.

Applying the principles of these recent cases, and others, it is respectfully submitted that because of the deliberate and conscious * suppression of evidence by the prosecution here, the court below should have applied the *Kahn* test (whether the evidence was favorable to the accused) or, at minimum, the *Miller* test; under either, the defendants are entitled to a new trial.

POINT II

The convictions herein are void because of the expiration of the term of the grand jury prior to the return of the indictment.

A. Introduction

Premised on this Court's holding in *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974), defendants moved to dismiss the indictment on the ground that it was voted by a grand jury whose eighteen-month term had expired under Fed. R. Crim. P. 6 (SA. 90). Finding that "the cir-

* The fact that suppression is deliberate and conscious, of course, need not include a finding that the prosecution acted in bad faith. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Seijo, supra*, at 1363.

cumstances surrounding the signing of the [empanelling] order . . . " here were persuasive to establish that it had been authorized by 18 U.S.C. § 3331, permitting a thirty-six-month term for the grand jury, the court below denied the motion (SA. 128). Defendants here contend that the court's ruling, relying on assumptions and impermissible evidence extrinsic to the empanelling order, is clearly erroneous.

B. The factual basis for the motion to dismiss the indictment.

The indictment in this case was filed on June 21, 1973. It was voted by a special grand jury which was empanelled pursuant to an order signed by the late Chief Judge Sidney Sugarman of the United States District Court for the Southern District of New York on March 23, 1971 and filed that same day, directing that a special grand jury be empanelled on April 20, 1971. The order was predicated upon an annexed certificate of Daniel P. Hollman, then a Special Attorney appointed under the authority of the Department of Justice, who requested the empanelling of the grand jury (SA. 98-100). The form of the order makes no reference to the authority under which the grand jury was empanelled and was, in all respects, similar to two earlier orders executed by Judge Sugarman upon Mr. Hollman's request—orders executed prior to October 15, 1970, the effective date of 18 U.S.C. § 3331—a statute authorizing the empanelling of grand juries whose life can be extended to thirty-six months (SA. 101-106). Prior to October 15, 1970, the only statutory authority for empanelling grand juries, whether regular or special grand juries, was Federal Rules of Criminal Procedure 6, a rule authorizing the empanelling of grand juries for a term of eighteen months with no provision for extension. The form of order employed by

Judge Sugarman directing the empanelling of the April 1971 grand jury was, in all essential respects, the same order employed for the empanelling of all grand juries in the Southern District of New York during this period.

On April 20, 1971, Judge Dudley B. Bonsal of the Southern District, in his charge to the grand jury, indicated to the jurors that they were to be an "Organized Crime" grand jury (SA. 112-23). But, there is no indication that Judge Bonsal was acting upon anything other than what was told to him by Mr. Hollman. No affidavit of Judge Bonsal was submitted, and yet the lower court "assumed" that Judge Bonsal "undertook to ascertain the factual basis for his assertions" (SA. 129). Since the empanelling order, not the charge to the grand jury, is the significant and operative document, Judge Bonsal's remarks on April 20, 1971 cannot be read to interpret Judge Sugarman's intent a month earlier and are therefore irrelevant, especially because there is no indication that Judge Bonsal was acting pursuant to advice given him by Judge Sugarman.

The term of the April 1971 special grand jury expired, we contend, on October 20, 1972. However, an order purporting to extend the term of this grand jury from October 20, 1972 until April 20, 1973 was signed by Chief Judge David Edelstein of the Southern District of New York on October 12, 1972 and was filed on October 16, 1972. That order specifically relied upon 18 U.S.C. § 3331 (a) as authority for the extension, notwithstanding the fact that the original empanelling order contained no indication that this special grand jury was an "Organized Crime" grand jury empanelled pursuant to that section (SA. 107-108).

On April 16, 1973, Judge Morris E. Lasker of the Southern District signed a second order of extension, pur-

porting to extend the life of the April 1971 special grand jury from April 20, 1973 until October 20, 1973 (SA. 109-110). That order—like the prior extension order—again relied upon Section 3331(a) as authority for the extension. Moreover, this order was not filed until April 23, 1973, three days after the term of the April 1971 grand jury—as extended—would have expired (SA. 109). The instant indictment was filed during this second extension.

- C. Under applicable principles of law, the April 1971 grand jury was improperly extended.

1. The Order of March 23, 1971

In *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974), this Court held that purported extensions of special grand juries made pursuant to 18 U.S.C. § 3331 were ineffective to extend their life unless such grand juries were convened pursuant to the Organized Crime Control Act, and that indictments returned during such extended terms were void. The Court, in *Fein*, held that a grand jury convened pursuant to Fed. R. Crim. P. 6 could not be extended by virtue of Section 3331, and that such extensions were wholly invalid.

The empanelling order under which the April 1971 special grand jury was convened was precisely the same form of order used to convene every grand jury in this district during this period. That same order was used long before the effective date of the Organized Crime Control Act, at which time the only authority for empanelling grand juries was Rule 6. Thus, there is no basis for determining the April 1971 grand jury was empanelled pursuant to the Organized Crime Control Act and that it could therefore be extended by virtue of that Act.

The lower court, based upon Judge Bonsal's remarks and other extrinsic evidence, in essence found that Chief Judge Sugarman's intent must have been to empanel a Section 3331 grand jury and not a Rule 6 grand jury. Defendants contend, to the contrary, that none of the items submitted by the government in opposition to this motion disclosed in the least the intentions of Chief Judge Sugarman, and in any event, reliance upon any such extrinsic evidence would be improper as a matter of law.

In attempting to construct Chief Judge Sugarman's intentions, the lower court misconstrued the recent holding of this Court in *Wax v. Motley*, 510 F.2d 318 (2d Cir. 1975). In *Wax*, the Court refused to dismiss an indictment returned during an extension of the April 1972 grand jury empanelled by order of Chief Judge Edelstein dated March 17, 1972 which made no reference to the statutory authority under which the grand jury was to be empanelled. The Court held that there was a "patent ambiguity on the face of Chief Judge Edelstein's original order" (*Id.* at 320) and permitted the Court to correct the order *nunc pro tunc* based upon Chief Judge Edelstein's present recollection as to his intent at the time he signed the original empanelling order. The Court clearly held that it would be inappropriate to permit parol evidence to resolve the ambiguity of the order and specifically stated that the circumstances in *Wax* involved "a *nunc pro tunc* amendment to an order . . ." based upon Chief Judge Edelstein's "present expression of [his] original intention . . .". The Court went on to say that:

" . . . the judicial power to correct errors must be sharply restricted and based upon clear recollections excluding any considerations arising after the event". (*Id.* at 321).

Since, in *Wax*, Chief Judge Edelstein submitted an affidavit stating that his intent in March 1972 was to em-

panel an "organized crime" grand jury pursuant to 18 U.S.C. § 3331, the Court held that the extensions of the April 1972 grand jury beyond the eighteen-month term were valid. The Court of Appeals was careful to distinguish between parol evidence and a *nunc pro tunc* amendment, since under the latter rationale, the question could be decided without the use of an adversary hearing. *Ibid.*

In the matter at bar, however, Chief Judge Sugarman obviously cannot amend and correct his order; thus, the amendment *nunc pro tunc* based upon refreshed recollection such as the Second Circuit permitted Chief Judge Edelstein to do in *Wax, supra*, cannot resolve the issue of Chief Judge Sugarman's intent. Simply put, there was no proof that Chief Judge Sugarman had the slightest intention that the grand jury to be empanelled pursuant to his March 23, 1971 order be a Section 3331 grand jury, or, as stated another way, the permissible proof is clear that Chief Judge Sugarman, by using the same form he used to empanel Rule 6 grand juries, certainly intended to empanel such a grand jury. Since *Wax, supra*, prohibits the use of parol evidence, a *fortiori*, this Court has prohibited the use of conjecture to resolve any ambiguity. Yet conjecture is what was submitted by the government: thus the argument that Chief Judge Sugarman "must have found that upon the passage of [Organized Crime Control] Act the Strike Force . . . intended to make full use of each of the powers conferred by that Act" (Gov't Memo. at 8), is without foundation and falls by its own weight. If it were so, certainly the Strike Force and Chief Judge Sugarman would have made some reference to the Act in the papers and order requesting and empanelling the grand jury. Similarly impermissible, and equally strained, is the speculative argument that since Section 3331 requires that at least one special grand jury be summoned every eighteen months in the Southern District, Chief Judge Sugarman must have intended that a

grand jury which was summoned only six months into this eighteen-month period be a Section 3331 grand jury.* Again, had such a grand jury been intended, specific reference to the Act should and would have been made by Chief Judge Sugarman.

2. The extension order of April 23, 1973

The lower court, overlooking a statutory provision to the contrary, found that the second extension of the grand jury, signed by Judge Lasker on April 16, 1973, but not filed until April 23, 1973, three days after the expiration of the grand jury's purportedly extended term on April 20, 1973, was valid. The late filing of Judge Lasker's order by itself renders the indictments here invalid.

In support of its finding, the court relied upon the decision in *Nolan v. United States*, 163 F.2d 768 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948), in which the Court upheld the validity of an indictment voted by a grand jury whose empanelling order had never been signed by the Judge. However, the Court in *Nolan* specifically held that the authorizing statute there involved did not require that the empanelling order be in writing or be signed by the Court. In the case at bar, however, Section 3331(a) specifically states that the "court may enter an order extending such term for an additional period of six months" (emphasis added). Rule 55 of the Federal Rules of Criminal Procedure is clear that "enter" means entry on the "criminal docket", and no entry was made of the second extension order until

* Nor is it of the least importance that the extensions of the grand jury were premised on Section 3331. The extensions of the grand jury in *United States v. Fein*, *supra*, were likewise premised, but this Court held that they were completely irrelevant to the question of whether the grand jury originally had been empanelled pursuant to Section 3331 or Rule 6.

after the grand jury had expired on April 20, 1973 by the terms of Chief Judge Edelstein's extension order of October 12, 1972.

Thus, even if the earlier extensions were valid, the one filed on April 23, 1973 clearly was not.

* * * * *

In sum, the grand jury on June 23, 1973 had ceased to have any authority; consequently, the indictment herein was null and void and defendants' convictions must be reversed.

POINT III

The indictment should have been dismissed because the special attorney who presented this case to the grand jury was not properly authorized to do so.

The presentation of this case to the grand jury on behalf of the government was under the sole direction of Gerard J. Hinckley, Esq., then an employee of the Department of Justice acting under authority purportedly granted to him by a letter dated January 7, 1972 from then Deputy Attorney General Richard G. Kleindienst (SA. 137). Defendants' motion to dismiss the indictment on the ground that Mr. Hinckley's authority was insufficient was denied by the court below (SA. 148). The denial of this motion, we submit, was erroneous as a matter of law.

The statute under which Mr. Hinckley was appointed as a Special Attorney is 28 U.S.C. § 515. That section, in pertinent part, provides:

"(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under

law, may, *when specifically directed* by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct . . ." (emphasis added).

The text of the letter purporting to authorize Mr. Hinckley to present the instant case to the grand jury is similar to numerous others in use at the time. The first paragraph merely tracks the language of the statute and refers to "cases growing out of the transactions hereinafter mentioned. . ." The second paragraph begins as follows:

"The Department is informed that various persons, companies, corporations, firms, associations and organizations *to the Department unknown* have violated in the above named District and in other judicial districts the laws relating to . . ." (emphasis added).

The letter then goes on to list some twenty statutes concluding with the following language: "and other criminal laws of the United States . . ." (SA 137). It is respectfully submitted that this letter lacked the specificity contemplated by Congress and required by Section 515 for the appointment of special prosecutors and that it was therefore ineffective to authorize Mr. Hinckley to present the instant case to the grand jury.

Defendants are aware that this Court has recently reviewed the question of the authority of similar Special Attorneys and has found that the authority granted to them by the Attorney General was sufficient. *In Re Grand Jury Subpoena of Persico*, — F.2d — (Dkt. No. 75-2030 2d Cir. June 19, 1975). It is respectfully submitted that this Court should reconsider its holding, and if so, per-

mit the defendants fully to brief and argue this point. If the Court wishes to adhere to its ruling in *Persico, supra*, we wish to preserve this point for further appeal, if one is necessary.

CONCLUSION

For all the above reasons and the reasons contained in the main brief, it is respectfully submitted that the convictions of defendants Stofsky and Gold should be reversed.

Respectfully submitted,

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August 8, 1975

AFFIDAVIT OF SERVICE BY MAIL

State of New York

County of Kings

Albert Sensale

_____, being duly sworn, deposes and says, that deponent
is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue

Brooklyn, New York 11203

That on the 8th day of day August - 1975, deponent
served the within Briefs & Appendices

upon Rooney & Evans, 521 Fifth Avenue, New York, New York 10017

Rabinowitz, Boudin & Standard, 30 East 42nd Street, New York, NY 10017

Paul J. Couran, Esq. Southern District, US Court House, Foley Sq.

New York, New York 10007

Attorney(s) for the Def. - Appeal in the action, the address designated by said attorney(s) for the
purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post
office official depository under the exclusive care and custody of the United States Post Office department
within the State of New York.

Albert Sensale

Sworn to before me,

This 8 day of AUGUST 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1978